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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHAT EMPLOYMENT-RELATED CONNECTION TO A VESSEL IN NAVIGATION IS NECESSARY FOR A MARITIME WORKER TO QUALIFY AS A SEAMAN UNDER THE JONES ACT, 46 U.S.C. § 688?

INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of this case:

Chandris, Inc.

Chandris S.A.

Fourth Transoceanic Shipping Co., Ltd.

Antonios Latsis

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Petitioners, Chandris, Inc., Chandris S.A. and Fourth Transoceanic Shipping Co. Ltd., are affiliated with the following corporations:

Celebrity Cruises Inc.

Celebrity Cruise Services Ltd.

Celebrity Cruises (Management) Inc.

Celebrity Cruise Lines Inc.

Chandris (England) Ltd.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Second Circuit entered on March 24, 1994.

OPINIONS BELOW

The Order denying the Petition for Rehearing in the court of appeals (Appendix, A37) is unreported. The opinion of the court of appeals (Appendix, A1) is

reported at 20 F.3d 45. The judgment of the district court (Appendix, A34) is unreported.

JURISDICTION

Petitioners seek review of an opinion entered on March 24, 1994. The order denying the petition for rehearing of that opinion was entered on May 24, 1994. This petition for writ of certiorari is filed within ninety days of the entry of the May 24, 1994 order denying the petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2, Clause 1, of the United States Constitution, provides, in relevant part, that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

JONES ACT STATUTORY PROVISION

The Jones Act, 46 U.S.C. § 688, provides, in relevant part, "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . . "

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT PROVISION

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), provides, in relevant part, " 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel . . . . "

STATEMENT OF THE CASE

District Court Jurisdiction

Jurisdiction of the United States District Court, Southern District of New York, was based upon 28 U.S.C. § 1331 and 46 U.S.C. § 688.

Procedural History

In October 1991, Antonios Latsis ("Mr. Latsis") commenced a lawsuit pursuant to the Jones Act, 46 U.S.C. § 688, against Chandris, Inc. Mr. Latsis filed his action in connection with personal injuries allegedly suffered by Mr. Latsis while employed as a seaman on board a vessel owned by Chandris, Inc. In March 1992, Mr. Latsis filed an amended complaint naming additional defendants Chandris S.A. and Fourth Transoceanic Shipping Co. Ltd., as alleged owners of the vessel (collectively "Chandris"). (Appendix, A49). Chandris answered the amended complaint and denied Mr. Latsis' allegation that he was a

seaman within the meaning of the Jones Act, 46 U.S.C. § 688. (Appendix, A44).

In June 1993, a jury trial was held in the United States District Court for the Southern District of New York ("District Court"). At the conclusion of the trial and after receiving instructions from the District Court, the jury rendered a verdict finding that Mr. Latsis was not a seaman. (Appendix, A34, A42). The jury instruction on seaman status utilized by the District Court is consistent with *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). In accordance with the jury verdict and on June 17, 1993, the District Court entered a judgment dismissing the lawsuit. (Appendix, A34).

In July 1993, Mr. Latsis appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit"). On March 24, 1994, the judgment granted to Chandris by the District Court pursuant to the jury verdict was vacated by the Second Circuit based on the Second Circuit's conclusion that the District Court's jury instruction on seaman status constituted plain error. The Second Circuit vacated the District Court's dismissal and ordered a new jury trial even though the record supported a finding that Mr. Latsis spent only ten percent of his time aboard ship. (Appendix, A1). Chandris' timely petition for rehearing to the Appellate Court was denied on May 24, 1994. (Appendix, A37).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Introduction

The test for seaman status adopted by the Second Circuit in *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994) ("*Latsis* Seaman Test") conflicts with *Wilander*, 498 U.S. 337, and the seaman status test utilized by the Fifth and Eighth Circuit Courts of Appeals. Specifically, under the *Latsis* Seaman Test, a shore-based maritime worker who spends only ten percent of his work time on vessels is eligible for seaman status. *Latsis*, 20 F.3d at 54. The *Latsis* Seaman Test conflicts with *Wilander's* dictate that shore-based maritime workers are not seamen and the Fifth and Eighth Circuits' requirement that a seaman must spend a substantial part of his work time on a vessel. *Wilander*, 498 U.S. 337; *Miller v. Patton-Tully Transp. Co.*, 851 F.2d 202 (8th Cir. 1988); and *Robison*, 266 F.2d 769.[1]

The conflict created by *Latsis* promotes confusion and disharmony between the federal and state courts charged with administering the remedies available to seamen. By exercising jurisdiction in this case and completing the

[1] A very strong argument exists that *Latsis* also conflicts with the First Circuit Court of Appeals. Although *Latsis* accurately cites *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941) as the originator of the seaman status test adopted by the Second Circuit before *Latsis*, *Latsis* ignores *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975) and *Stafford v. Perini Corp.*, 475 F.2d 507 (1st Cir. 1973). Both *Bennett* and *Stafford* adopt the *Robison* Seaman Test used in the Fifth and Eighth Circuits. And, as discussed in more detail below, the *Robison* Seaman Test conflicts with *Latsis*. Adding to the confusion, the inconsistency between (a) *Carumbo* and (b) *Bennett* and *Stafford* is never addressed.

work left undone in *Wilander* and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), this Court can eliminate the conflict created by the Second Circuit regarding who is a seaman, as well as provide rationality, certainty and uniformity to this area of maritime law.

Background

Because of the expansive remedies afforded to seamen under the Jones Act and because the Jones Act did not define the statutory term "seaman," the question of who is a seaman has inundated the courts at least since the Jones Act was enacted in 1920. Initially, this Court defined seaman in broad terms and held that a longshoreman doing traditional seaman's work aboard a ship at the dock was a seaman. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926). However, within six months of the decision in *Haverty*, Congress overruled *Haverty* by passing the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The LHWCA provided for the payment of compensation to all injured maritime workers, except a "master or member of a crew of any vessel . . . . " 33 U.S.C. § 902(3)(G).

The confusion created by this Court's struggle to define the term seaman between 1940 and 1958 is chronicled in *Wilander*. And, as one critic explains:

> By the end of its labors in 1958, the Supreme Court, like the Congress, had declined the invitation to provide any bright-line test for seaman status. The [C]ourt's decisions provide nothing more than clues to define the term 'seaman': (1) permanent attachment to a vessel and (2) a broad view of aid to navigation. Most significantly, however, the [C]ourt abdicated its responsibility to provide at least a theoretical foundation for the determination of seaman status.

Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-5 at 175 (West 1987) (citations omitted).

"In 1959, the Fifth Circuit attempted to find its way out of what it called 'the labyrinth,' and working from the clues offered by the Supreme Court, formulated a test for seaman status that still holds sway today." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-5 at 176 (West 1987). The 1959 case that formulated a seaman test in the Fifth Circuit is *Robison* ("*Robison* Seaman Test"). *Robison* holds:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission . . . .

266 F.2d at 779.

Although *Wilander* resolved the conflict between the Fifth and Seventh Circuit Courts of Appeal regarding whether a seaman must aid in the navigation of a vessel, the confusion regarding what employment-related connection to a vessel is necessary to confer seaman status on

a maritime worker has not been addressed adequately by this Court. *See* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985) (cited in *Wilander*); Kenneth G. Engerrand and Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. Tex. L. J. 431 (1983) (cited in *Wilander*); Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 Tul. L. Rev. 373 (1994).

As a result, the federal and state courts remain hopelessly confused regarding the extent of the permanency requirement necessary for a maritime worker to obtain seaman status. Robertson, 64 Tex. L. Rev. 79; Engerrand and Bale, 24 S. Tex. L. J. 431. "If one searches through the post-*Robison* decisions with enough diligence, language supporting almost any client's argument for or against seaman status can generally be found." Robertson, 64 Tex. L. Rev. at 108. "It has even been suggested that 'three men in a tub would fit within [the court's] definition, and one probably could make a convincing case for Jonah inside the whale.' " Engerrand and Bale, 24 S. Tex. L. J. at 431. Now, approximately seventy-five years of confusion about the definition of a seaman under the Jones Act has culminated in *Latsis*.

Prior to this Court's opinions in *Wilander* and *Gizoni*, the Second Circuit articulated a three part test to determine seaman status under the Jones Act. *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) ("*Salgado* Seaman Test" or "Three-part Seaman Test"). The *Salgado* or Three-part Seaman Test is as follows:

> The vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation.

Salgado, 514 F.2d at 755.

The element of the *Salgado* or Three-part Seaman Test that required a maritime worker to be aboard a vessel naturally and primarily to aid in navigation was jettisoned by this Court in *Wilander*. 498 U.S. at 353. *Wilander* holds that a maritime worker who has a substantial sea-based, employment-related connection to a vessel in navigation qualifies as a seaman under the Jones Act even if the worker does not contribute to the navigation function of the vessel. *Wilander*, 498 U.S. at 355-357. Indeed, rather than focusing on the description of the maritime worker's job, *Wilander* (and later *Gizoni*) confirm that "[t]he key to seaman status is employment-related connection to a vessel in navigation." 498 U.S. at 355; 502 U.S. at 81. *See also Roth v. U.S.S. Great Lakes Fleet*, 25 F.3d 707 (8th Cir. 1994).

Conflict With The Supreme Court

In *Latsis*, the Second Circuit recognized the need to revise the *Salgado* Seaman Test in the wake of *Wilander* and *Gizoni*. Unfortunately, instead of conforming the new Second Circuit seaman status test to the principles articulated in *Wilander* and *Gizoni*, *Latsis* created the *Latsis* Seaman Test that conflicts with the decisions of this Court, the Fifth Circuit and the Eighth Circuit. *Wilander*, 498 U.S. 337; *Latsis*, 20 F.3d 45; *Miller*, 851 F.2d 202; *Robison*, 226 F.2d 769.[2]

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[2] *See* note 1.

The *Latsis* Seaman Test is as follows:

> The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) *the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature*; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

Latsis, 20 F.3d at 57 (emphasis added).

Although *Latsis* agrees that a substantial employment-related connection to a vessel is necessary to qualify as a seaman, *Latsis* holds that this requirement is satisfied if either the duration of the maritime worker's vessel-based employment *or the nature of the maritime worker's contribution to the vessel's mission or function is substantial.* The actual time spent aboard a vessel is not determinative. Under *Latsis*, a worker can obtain seaman status merely by proving that the worker expended a substantial amount of time and effort preparing to contribute to the function or mission of the vessel or to the accomplishment of its mission, regardless of whether the worker is a land-based or sea-based employee (and regardless of the amount of time spent on the vessel). 20 F.3d at 57.

The third element of the *Latsis* Seaman Test is contrary to the instruction of *Wilander*. Although *Wilander's* specific inquiry was limited to whether a worker must aid in the navigation of a vessel to qualify as a seaman, *Wilander* did state the following:

> Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.
>
> * * *
>
> [U]nder the Jones Act or general maritime law, seamen do not include land-based workers.
>
> * * *
>
> The 'member of a crew' exception in the LHWCA overrules *Haverty*; 'master or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' had been taken to include land-based employees.
>
> * * *
>
> We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones [A]ct, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction.

498 U.S. at 347-348, 353-354.

Notwithstanding *Wilander's* mandate that only sea-based workers are seamen, even land-based workers who spend ninety percent of their time and effort on shore preparing to contribute to the function of a vessel are eligible for seaman status under *Latsis*. 20 F.3d at 54. *Latsis* ignores the sea-based/land-based distinction that is critical to *Wilander*.

Examining the nature of a maritime worker's contribution to a vessel's function or mission without regard for the amount or percentage of time the worker spends aboard vessels undermines the land-based/sea-based distinction in *Wilander*. Allowing the *Latsis* Seaman Test to stand will once again thwart Congress' intent to "confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]." *Wilander*, 498 U.S. at 347, *quoting*, *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

Conflict With Other Circuits

The *Latsis* Seaman Test, besides conflicting with *Wilander's* sea-based/land-based analysis of seaman status, conflicts directly with the first prong of the *Robison* Seaman Test adopted by the Fifth and Eighth Circuits.[3]

---

[3] *See* note 1.

Latsis examines and criticizes the first prong of the *Robison* Seaman Test.[4] To merit seaman status, the *Robison* Seaman Test (as amplified by *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*)) requires a maritime worker to be assigned permanently to a vessel or perform a substantial part of his work on a vessel. Under the *Robison* Seaman Test, the substantial connection necessary to warrant seaman status is a time concept determined by the duration of the worker's employment-related connection to a vessel. Thus, a land-based employee who spends only a small percentage of time aboard a vessel would not qualify as a seaman under *Robison*.

Latsis compares and contrasts the substantial connection element of the *Robison* Seaman Test with the "more or less permanent connection with the ship" prong of the *Salgado* or Three-part Seaman Test. *Latsis* concludes that the time element that is critical to the *Robison* Seaman Test is contrary to the *Salgado* Seaman Test and now conflicts with the *Latsis* Seaman Test.

Under the *Latsis* Seaman Test, a worker like Mr. Latsis who spends only ten percent of his time aboard a vessel is eligible for seaman status. *Latsis* recognizes this direct conflict:

---

[4] In *Wilander*, this Court considered the second prong of the *Robison* Seaman Test. However, because the question before this Court in *Wilander* was limited to whether one must aid in the navigation of a vessel in order to qualify as a seaman, the first prong of the *Robison* Seaman Test was not analyzed.

It is clear, however, that the [Supreme] Court did not express a preference for the criteria contained in the *Robison* test. Left unclear, therefore, is just what sort of connection will amount to a substantial connection. Indeed, the Supreme Court did not even recognize, much less resolve the conflict between the criteria used to determine substantial connection under the *Robison* test and those used under the *Johnson* and *Salgado* tests.

* * *

Absent disapproval by the Supreme Court, the 'more or less permanent connection' formulation of the substantial connection requirement remains the law of this circuit. Therefore, it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit in *Robison*.

> The formulation of substantial connection followed by this circuit in *Salgado* is quite different from that followed by the Fifth Circuit in *Robison*.

20 F.3d at 52.

Moreover, the portion of the *Robison* Seaman Test that requires an examination of the duration of vessel-based employment to determine seaman status has been adopted by the Eighth Circuit Court of Appeals. *Miller*, 851 F.2d 202; *see also Slatton v. Martin K. Eby Const. Co., Inc.*, 506 F.2d 505 (8th Cir. 1974); *Petty v. Dakota Barge Service*, 730 F. Supp. 983 (D. Minn. 1989). The *Latsis* Seaman Test conflicts with the time aspect of the Eighth

Circuit's seaman test, as well as with *Wilander* and *Robison*.[5]

Confusion And Lack Of Uniformity In Interpreting An Important Issue Under The Jones Act

The *Latsis* Seaman Test confuses and complicates further an area of maritime law that could have enjoyed a brief period of stability following *Wilander* and *Gizoni*.[6]

This Court has long recognized that the federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), *citing*,

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[5] *See* note 1.

[6] In addition to the disagreement between the (a) Second Circuit and (b) the Fifth and Eighth Circuits regarding the importance of a putative seaman's temporal employment-related connection to a vessel, the circuit courts of appeals are not consistent with respect to the basic elements of the proper seaman status test. *Cf., Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941); *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 1994 U.S. App. LEXIS 14385 (3d Cir. N.J. June 13, 1994); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1265 (1992); *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1261 (1993); *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1481 (1992); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Roth v. U.S.S. Great Lakes Fleet*, 25 F.3d 707 (8th Cir. 1994); *McKinley v. All Alaska Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992), and *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993).

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). The Court's "strong concern for uniformity" in admiralty law, *Moragne*, 398 U.S. at 401, is directed at maintaining the smooth flow of maritime commerce by ensuring that "all vessel operators are subject to the same duties and liabilities." *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982). This Court granted certiorari in other areas of maritime law where the legal principles were either outdated or subject to conflicting interpretations by the circuit courts. *Howlett v. Birkdale Shipping Co., S.A.*, ___ U.S. ___, 114 S. Ct. 2057 (1994); *Wilander*, 498 U.S. 337; *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975).

The current maritime law regarding what employment-related connection to a vessel in navigation is necessary to obtain seaman status is unclear.[7]

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[7] Both judges and commentators have vastly divergent views regarding the ramifications of *Wilander* and *Gizoni*. Confusion exists regarding whether *Wilander* eliminated the permanent connection element: *See Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 215 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1065 (1994) ("We do not decide whether the requirement of permanent attachment survives [*Wilander*] with respect to Jones Act coverage of persons who . . . perform core navigation functions on a traditional vessel . . . . "); *Reeves v. Mobile Dredging & Pumping Co.*, 1994 U.S. App. LEXIS 14385 (3d Cir. N.J. June 13, 1994) ("There is seemingly an unresolved issue regarding whether the 'permanent connection' requirement for seaman status has survived [*Wilander*] . . . . "); and *Folse v. Western Atlas Int'l, Inc.*, 593 So. 2d 341, 343 (La. 1992) ("*Wilander* does not mention more or less permanent attachment to a vessel or fleet of vessels . . . *Gizoni* cast further doubt on the more or less permanent attachment aspect of *Robison*, *Barrett* and *Bach*").

The Second Circuit discusses openly its conflict with the Fifth Circuit and its criticism of the lack of instruction by this Court. *Latsis*, 20 F.3d at 51-56. The Eighth Circuit is also in conflict with the *Latsis* Seaman Test.[8] *Miller*, 851 F.2d 202. Moreover, no uniformity exists among the state courts regarding the proper seaman status test.[9]

Wilander requires permanent attachment: *See Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 709 (8th Cir. 1994) ("[*Wilander* requires] 'a definite and permanent connection with the vessel[.]' "); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1192 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1265 (1992) ("[*Wilander*] reinforced the importance of the first prong of the [Three-part Seaman Test] . . . ").

Wilander endorses *Robison*: David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com., 1, (1992) ("The Fifth Circuit's *Robison* approach to seaman status was thus ringingly endorsed [by *Wilander*] . . . . "); Edward M. Bull III, *Seaman Status Revised: A Particular Guide to Status Determination*, 6 U.S.F. Mar. L. J. 547 (1994) ("[*Wilander*] call[s] for [the] uniform application of a *Robison*-style test."); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6-9 (2d ed. 1994) ("In fact, the only lower court test of seaman status left standing after *Wilander* is that of the Fifth Circuit, the famous *Robison* test . . . "); *but see*, Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 Tul. L. Rev. 373 (1994) ("[T]his writer and other commentators believe that *Wilander's* reasoning portends the elimination of the substantial work alternative and the return to permanent assignment as the necessary vessel connection test . . . ").

[8] *See* note 1.

[9] Petitioners' survey of the fifty states reveals the following:

No state follows the *Latsis* Seaman Test.

Nine states follow the Fifth Circuit *Robison* Seaman Test. *See e.g.*, *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530 (Ala. 1985); *Plantation v. Roberts*, 342 So. 2d 69 (Fla. 1976); *Browning v. B.F. Diamond Const. Co.*, 289 S.E.2d 268 (Ga. 1982), *cert. denied*, 459 U.S. 837 (1982); *Patterson v. Weber Marine*, 635 So. 2d 686 (La.

This Court's guidance represents the only chance to create a uniform rule of law that will ensure a consistent

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App. 1994); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991); *Texaco, Inc. v. Addison*, 613 So. 2d 1193 (Miss. 1993); *Toland v. Atlantic Gahagan Joint Venture Dredge*, 262 A.2d 886 (N.J. Super. App. Div. 1970), *aff'd*, 271 A.2d 2 (N.J. 1970), *but see, Rogisich v. Union Dry Dock & Repair Co.*, 150 A. 670 (N.J. 1930) ("member of crew doing work ordinarily performed by seaman"); *Johnson v. Gulf Coast Contracting Services, Inc.*, 746 S.W.2d 327 (Tex. App. 1988); *Tidewater Const. Corp. v. Duke*, 169 S.E.2d 585 (Va. 1969), *cert. denied*, 397 U.S. 938 (1970).

Four states follow the Three-part Seaman Test. *See e.g., Eaton v. Connolly-Pacific, Inc.*, 184 Cal. Rptr. 852 (Cal. App. 1982); *Dungey v. United States Steel Corp.*, 499 N.E.2d 545 (Ill. App. 1986), *appeal denied*, 505 N.E.2d 352 (Ill. 1987), *cert. denied*, 484 U.S. 819 (1987); *Arundel Corp. v. Jasper*, 150 A.2d 415 (Md. 1959); *Lindgren v. Tugboat Dalzellable, Inc.*, 259 N.E.2d 916 (N.Y. 1970) (uses Three-part Seaman Test), *but see, O'Brien v. New York*, 582 N.Y.S. 2d 763 (N.Y. App. Div. 1992) (uses *Robison* Seaman Test).

Six states have fashioned tests that fit no distinct category. *See e.g., Bowers v. Kaiser Steel Corp.*, 422 P.2d 848 (Alaska 1967), *cert. denied*, 388 U.S. 910 (1967) (requires performance of navigation function); *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989) (employee aboard vessel is seaman, who must be "equal in disposition and seamanship" to ordinary persons in the calling); *Brannan v. Great Lakes Dredge & Dock Co.*, 91 N.W.2d 166 (Minn. 1958) (permanent connection required, but contradictions persist in remainder of test); *Bowery v. Hartford Acc. & Indem. Co.*, 202 S.W.2d 790 (Mo. 1947), *cert. denied*, 332 U.S. 838 (1947) (those "primarily on board to aid vessel in navigation"); *Brown v. L.A. Wells Const. Co.*, 56 N.E.2d 451 (Ohio 1944) (person working on barge is seaman); *Domandich v. Doratich*, 5 P.2d 310 (Wash. 1931) (all hands in furtherance of main object of enterprise).

Thirty-one states and the District of Columbia have no clearly articulated seaman status test under the Jones Act:

seaman test under the Jones Act regardless of the forum where a claim is filed.

Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Iowa; Kansas; Kentucky; Maine (*See Petition of Pierce*, 136 A.2d 510 (Me. 1957) (seaman test decided outside of Jones Act)); Michigan (*See Szopko v. Kinsman Marine Transit Co.*, 397 N.W.2d 171 (Mich. 1986), *cert. denied*, 483 U.S. 1007 (1987) (discussing course of seaman's employment, but giving no test for seaman status)); Montana; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; North Dakota; Oklahoma; Oregon (*See Barrell v. Brown*, 495 P.2d 733 (Or. 1972) (discusses vessel in navigation requirement only)); Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont; West Virginia (*See Indiana & Michigan Elec. Co. v. Workers' Compensation Comm'n*, 403 S.E.2d 416 (W.Va. 1991) (discussing scope of Jones Act relative to LHWCA and Workers' Compensation law, but giving no test for seaman status)); Wisconsin, and Wyoming.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and exercise its jurisdiction.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and
FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 735 – August Term, 1993
(Argued December 6, 1993 Decided March 24, 1994

Docket No. 93-7704

Antonios Latsis,

Plaintiff-Appellant,

v.

Chandris, Inc., Chandris, S.A., Trans Oceanic Shipping Co., Ltd.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED: MAR 24 1994 GEORGE LANGE III, CLERK

Before OAKES, KEARSE and CARDAMONE, *Circuit Judges*.

Appeal from a judgment dismissing the complaint of Antonios Latsis who sought compensatory damages under the Jones Act for personal injuries he sustained while aboard a vessel in navigation. The jury found that Latsis was not a "seaman" and therefore returned a verdict in favor of defendants. We now hold that the jury instructions were erroneous and resulted in substantial prejudice to Latsis.

Remanded for retrial with jury instructions in accordance with this opinion. Judge Kearse dissents in a separate opinion.

Lewis Rosenberg, New York, NY (Barry I. Levy, Shapiro, Shiff, Reilly, Rosenberg & Fox, of counsel), *for Plaintiff-Appellant.*

William J. Brady, III, New York, NY (Christ Stratakis, Poles, Tublin, Patestides & Stratakis, of counsel), *for Defendants-Appellees.*

OAKES, *Senior Circuit Judge:*

This case causes us to re-examine the definition of seaman as charged in Jones Act cases in light of two recent opinions of the Supreme Court: *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337 (1991), and *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S. Ct. 486 (1991) (explicating *Wilander*). Specifically, we must determine whether an "employment related connection to a vessel in navigation" must be substantial either in terms of the plaintiff's "permanent assignment to the vessel" or "performance of a substantial part of his work on the vessel." A subsidiary question is whether the district court properly instructed the jury that it could not consider the period of time a vessel was in drydock in determining whether the plaintiff performed "a substantial part of his work on the vessel." We find that, although *Wilander* overrules the "aid to navigation" element of *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975), the "more or less permanent connection" requirement articulated in *Salgado* remains the law of this circuit. In ignoring this

formulation and adopting an alternative formulation, the district court misapplied the law and committed plain error. This error resulted in substantial prejudice to Latsis because the jury was effectively instructed to determine the substantiality of Latsis's connection to the vessel solely on the basis of Latsis's temporal relationship with the vessel. This prejudice was compounded by the district court's further instruction that the time the vessel was in drydock could not be considered – an instruction that improperly served to limit the substantiality of Latsis's connection to the vessel in terms of Latsis's temporal relationship with the vessel. We vacate the judgment of the United States District Court for the Southern District of New York, Loretta Preska, *Judge*, and remand for a new trial.

I. Background

A. Facts

Antonios Latsis brought this action under the Jones Act for compensatory damages for personal injuries sustained by Latsis culminating in the loss of sight to his right eye. These injuries allegedly resulted from the negligence of the ship's doctor who failed to treat promptly Latsis's detached retina. Latsis alleges that he sustained these injuries while employed as a "seaman" aboard a cruise ship then known as the S.S. Galileo, one of a fleet of cruise ships owned and operated by appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd. (hereinafter "Chandris").

The injuries are said to have resulted from medical malpractice by the ship's doctor on May 14, 1989, a

Sunday on which the Galileo took on passengers at Baltimore, Maryland, for a regularly-scheduled, round trip cruise of five days to Bermuda. Around noon of that Sunday, while the vessel was still in port, Latsis, on board and assigned to the Galileo in his capacity as a supervising engineer for Chandris, began experiencing a central visual disturbance which seemed to originate in the bottom portion of his eye. As the day progressed the obstruction to his vision expanded. Latsis did not appreciate the significance of the problem until the time approached to sail in the late afternoon, when he sought medical guidance from an on board nurse who advised him to see the ship's doctor at once. He did so as the ship pulled from the dock in the port of Baltimore. Once in the ship hospital, he consulted Dr. Gonzalez, the physician employed by Chandris for this vessel. Dr. Gonzalez looked at Latsis's eye through an ophthalmoscope and said it appeared to him to be a detached retina. Gonzalez recommended that Latsis relax until he could see an eye specialist when they arrived two days later in Bermuda. Latsis received no further medical care until after the ship arrived in Bermuda, and no attempt was made to transport him ashore for prompt medical care by means of a pilot vessel, helicopter, or otherwise. During this interval, the impairment of his vision continued to intensify until all central vision in the eye was lost.

The malpractice allegations relate to the fact that Dr. Gonzalez, unlicensed in any state in the United States, neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that " . . . any patient with a suspected or established retinal detachment should be seen on an emergency basis

by an ophthalmologist." When the vessel reached Bermuda, a doctor diagnosed his eye as having a massive detachment of the retina. The doctor recommended immediate hospitalization. After a consultation with Latsis's regular eye doctor in New York and another New York eye specialist, the doctors recommended surgical reattachment of the retina. Although Latsis underwent surgery, the end result was that he lost 75 percent of his central vision and can only see light on the sides of his right eye.

At the time Latsis presented himself for treatment in Bermuda, he was given a Chandris form signed by the ship's captain, chief purser, and Dr. Gonzalez, requesting medical attention be provided to Latsis for his "detected [sic, detached] retina" and describing Latsis as a "crew member" holding the "position" of "supt.engineer."

Evidence in the case indicated that Latsis, a naturalized American citizen of Greek ancestry, has had a lifelong involvement with the sea and shipping beginning with his entry into the Merchant Marine as a cadet in Germany following his graduation from high school, his sailing aboard a merchant ship as a second mate following successful completion of his studies and examinations, and finally with his being appointed captain of a small Mediterranean vessel. Thereafter, he became chief mate on a larger vessel. He came to the United States in 1967 and promptly became a United States citizen. He was employed in San Francisco with a firm of ship surveyors while continuing his education at the University of California at Berkeley. In 1973 he was awarded a Bachelor's Degree of Science and Mechanical Engineering from Berkeley and a year later received a Master's Degree

in Naval Architecture, working in the Maritime Industry during this time for the Pacific Marine Association in the ports of San Francisco and Oakland. After graduation he went to New York to work for the American Bureau of Shipping, and later for Southern Star Shipping Company as a superintendent and engineer. He supervised Southern Star's vessels' operations and maintenance for 11 years before becoming employed in 1989 by Chandris out of its Miami, Florida office.

Chandris operated a large fleet of merchant vessels, five of which sailed from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico. For the first three months, Latsis was employed as a consultant and thereafter became a salaried employee. His duties were not confined to any single vessel but ran to the whole fleet. Latsis's duties included not only overseeing the vessels' engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore. While he necessarily familiarized himself with all of the vessels' power plants and engineering functions, he attended several hands-on repairs in a supervising capacity and monitored problems that the ships had or could develop. He was particularly in charge of the electronic equipment, both retrofit and existing equipment.

Latsis's work required him to travel with various ships in the fleet from time to time. The evidence here was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent. Latsis maintained his family and residence in Rye, New York, although the

company provided him with housing and the use of a rental car in Miami because his office work was regularly there. The vessel on which he was sailing and with which he had more connection than any other vessel in the fleet was the 27-year-old S.S. Galileo, as it was then known, aboard which he had sailed from Miami to Mexico with specialists from Germany to plan for a conversion and upgrading scheduled to take place in Germany in the following year. He helped draw specifications to keep the older ship in repair while sailing on its cruise routes to Mexico and Nassau in the Bahamas. In fact, he had been on board the Galileo at the conclusion of a regular two-day cruise originating from and returning to Baltimore, having joined the ship there on Friday, March 12, two days before the scheduled trip to Bermuda during which his eye injury occurred as above stated. On the Baltimore-Bermuda trip, Latsis was responsible for escorting various shipyard personnel around the ship in connection with the upcoming conversion of the vessel. In fact, he was busy with these people after he first noticed the problem with the vision in his right eye at about noon on Sunday, May 14, up until the time of sailing when he finally went to see the ship's nurse who sent him to Dr. Gonzalez.

According to Demetrius Kaparis, who was a senior vice president of Chandris, Inc. and head of its technical department and technical operations before it was taken over by Celebrity Cruises, Inc., Latsis was hired on a regular basis as a superintendent/engineer with the specific work of supervising the electronic systems of their ships and also upgrading the computerized systems and the computerized communication between the ships and

the Chandris Miami office. The company had five superintendent/engineers, two in Miami and three in Greece, and all of the engineering department of the ships and masters of the ships reported to Kaparis for technical matters. The Chandris vessels, depending upon size, carried between 12 and 14 licensed engineers on board, and Kaparis supervised six vessels, all passenger cruising ships customarily calling in at New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami, and San Juan. Usually, a vessel would be in home port about every seven days. Occasionally, depending on her itinerary, the ship would return to home port after a two or five day cruise. Vessels were usually in home port between 9 and 14 hours. Each ship had a superintendent/engineer, completely responsible, who reported to Kaparis directly. No vessels were assigned to Latsis "because he was taking care of the electronics systems of the ships." in other words, the whole fleet. Latsis reported to Kaparis.

Following Latsis's surgery and recuperation, lasting approximately six weeks, during which he received full pay, he resumed his duties in July, 1989, in Miami, and on September 30 sailed with the Galileo to Bremerhaven, Germany, where the vessel was placed in drydock. The conversion of the vessel was a $65 million job during the course of which the vessel's bottom plates and propeller were removed, the conversion being completed in March, 1990, and the vessel being renamed the Meridian. Latsis, who had been with the vessel the entire time it was in drydock in Bremerhaven, sailed back to the United States aboard the Meridian and continued to work for Chandris until November, 1990, at which time his employment

with Chandris terminated. Suit was filed in October, 1991. The district court had subject matter jurisdiction under 28 U.S.C § 1331 (1988), and 46 U.S.C. app. § 688 (1988).

B. Proceedings Below

Trial lasted four days. In the charge to the jury, the judge told the jury that the plaintiff must prove, by a preponderance of the evidence, four elements, namely, that he was a member of the crew of a vessel acting in the course of his employment, that is, that he was a seaman; second, that the defendants were his employer; third, that the defendants or an officer, employee, or agent of one of them was negligent; and, fourth, that such negligence played a part in bringing about the injury to the plaintiff. As to the first element, the jury was told that it could find that the plaintiff was a seaman if the jury found, by a preponderance of the evidence, two things:

> First, the plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may *not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.* You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers. (emphasis added).

The second element was stipulated to, and that was that plaintiff's capacity and duties performed "contributed to the function of the vessel or the accomplishment

of the vessels' mission or to the operation or maintenance of the vessels during their movements or while at anchor for the vessels' future trips." The court instructed that the second element involved in proving seaman status had been met, and that in considering whether plaintiff has otherwise proved seaman status, "you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer."

Latsis did not object to these instructions in their entirety. Latsis did object, however, to that portion of the charge that "explicitly takes from the jury's consideration the period of time that the Galileo was in drydock in Germany." The jury returned a verdict in favor of Chandris solely on the issue of Latsis's status as a "seaman" pursuant to the Jones Act. On June 17, 1993, the clerk entered a final judgment. On July 15, 1993, Latsis filed a timely notice of appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1988).

We now hold that the jury instructions were an erroneous application of the law. We therefore remand the case for retrial with jury instructions in accordance with this opinion.

II. Standard of Review

Normally, we will not consider a challenge to a jury charge if a party failed to object at trial. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection"). Thus, where "no timely objection was

made to the instruction or to the interrogatories in the district court . . . we may reverse on this ground only if 'the district court committed plain error in its charge and interrogatories.'" *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1078 (2d Cir. 1993) (footnote omitted) (quoting *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 636 (2d Cir. 1986)). An error is plain "if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law." *Abou-Khadra*, 4 F.3d at 1078; *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 493-94 (2d Cir. 1985). Although even a plain error will not warrant reversal if it is harmless, we will reverse where a plainly erroneous instruction misapplies the law as to a core issue in the case resulting in the substantial prejudice of the party challenging the instruction on appeal. *Schaafsma*, 802 F.2d at 637; *see* Fed. R. Civ. P. 61. Although Latsis objected to the drydock portion of the instruction, he failed to object to the instruction as a whole. We therefore review Latsis's claim under the plain error standard.

III. Discussion

A. The Definition of "Seaman" in the Second Circuit before *Wilander*

Prior to the Supreme Court's recent opinions in *Wilander* and *Gizoni*, this circuit's definition of "seaman" under the Jones Act was three-pronged:

> "the vessel must be *in navigation*, there must be a *more or less permanent connection* with the ship, and the worker must be aboard naturally and primarily as an *aid to navigation*."

Salgado, 514 F.2d at 755 (quoting *Klarman v. Santini*, 503 F.2d 29,33 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), and *Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966)) (emphasis added to distinguish the prongs). For convenience, we denominate these prongs (1) the "vessel in navigation," (2) the "substantial connection," and (3) the "aid to navigation" elements.[1] The Second Circuit test very closely followed the test first adopted by the First Circuit in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) (citations from sundry circuit courts omitted). Cases in several other circuits also had adopted essentially the same test. *See, e.g., McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953) (defining "member of a crew" in accordance with the three-pronged test); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir.) (laborers employed in dredging operations to level off gravel pumped up from river bottom and pumped onto barges held to be seamen under the Jones Act), *cert. denied*, 346 U.S. 817 (1953); *Rackus v. Moore-McCormick Lines, Inc.*, 85 F. Supp. 185, 187 (E.D. Pa. 1949); *see also* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 94 (1985) (the "Robertson article").

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[1] As a minor matter, we note that *Wilander* refers to this element as "aid *in* navigation." Other courts have used the phrase "aid *to* navigation." To emphasize the difference between this element and the "vessel *in* navigation" element, we use the phrase "aid *to* navigation."

B. The Demise of the "Aid to Navigation" Element – *Wilander*

Early on, the Fifth Circuit, in *Offshore Co. v. Robison*, 266 F.2d 769, 779-80 (5th Cir. 1959), criticized the "aid to navigation" language of the three-pronged test:

> Our review of the cases shows this [aid to navigation] test has been watered down until the words have lost their natural meaning. . . . With due deference to the Supreme Court, we attach less importance to either of these catchphrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured.

Id. at 780 (jury question raised whether roughneck as member of drilling crew was a seaman working on main deck of a mobile drilling platform or barge resting on the bottom of the Gulf of Mexico). After review of the Supreme Court and other relevant case law, the *Robison* court reformulated the criteria for seaman status:

> there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in

> terms of its maintenance during its movement or during anchorage for its future trips.

Robison, 266 F.2d at 779 (footnote omitted).[2] Thus, the Fifth Circuit abandoned the "aid to navigation" element of the common law definition of seaman in favor of language that reflected the tendency of the courts to extend seaman status to employees who do what the Supreme Court would eventually call "the ship's work." *See Wilander*, 498 U.S. at 355.

The *Robison* test differs from the three-pronged test in two other significant respects, however. First, the *Robison* test dropped the first prong of the test, that is, the "vessel in navigation" element. Second, the *Robison* test replaced the more or less permanent connection prong of the test with the following requirement:

> the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted).

Eventually, the *Robison* test became the accepted test of the Fifth Circuit. *See, e.g., Balfer v. Mayronne Mud & Chem. Co.*, 762 F.2d 432, 434 (5th Cir. 1985). This court, however, retained the three-pronged test. *See, e.g., Salgado*, 514 F.2d at 755; *Buccellato v. City of New York*, 808 F. Supp 967, 971 (E.D.N.Y. 1992). In *Johnson v. John F. Beasley Constr. Co.*, 742 F. 2d 1054, 1062-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), the Seventh Circuit

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[2] We note again that the jury instructions in this case are substantially based upon the *Robison* test.

attempted to highlight the difference between the two tests, focussing on the "aid to navigation" prong of the three-pronged test and the significant contribution aspect of the *Robison* test. Reasoning that the significant contribution aspect of the *Robison* test was "too broad," the Seventh Circuit adopted yet another test for seaman status – one combining the "more or less permanent connection" and the "vessel in navigation" elements of the three-pronged test and a requirement that "the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Id.* at 1063.

The Supreme Court in *Wilander* addressed the conflict between the Fifth Circuit's *Robison* test and the Seventh Circuit's *Johnson* test, *Wilander*, 498 U.S. at 340, but only as to one difference between the two tests – the aid to navigation requirement. The Supreme Court jettisoned the "aid to navigation" element, and announced that "the better rule is to define 'master or member of a crew' under the [Longshore and Harbor Workers Compensation Act], and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation." *Wilander*, 498 U.S. at 353, 354. The Court observed, that "[t]his rule best explains our case law and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction." *Id.* at 354. The Court continued to write, "It is not the employee's particular job that is determinative, but the employee's connection to a vessel," *id.*, and concluded that "[t]he key to seaman status is employment-related connection to a vessel in navigation." *Id.* at 355.

In so doing, the Court adopted only so much of the *Robison* test as required that a seaman's duties " 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " *Wilander*, 498 U.S. at 355 (quoting *Robison*, 266 F.2d at 779). The Court did not adopt the *Robison* test in its entirety. Indeed, the Court cited, with apparent approval, the Robertson article which called for revision of the *Robison* test, stating that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* As we discuss more fully below, the Court did not follow *Robison*'s departure from the "vessel in navigation" element of *Salgado*. On the contrary, the Court's language, "[t]he key to seaman status is employment-related connection to a *vessel in navigation*," *id.* (emphasis added), confirms that this element remains an important part of the definition of a seaman. Also, the Court expressly noted that, "[w]e are not called upon here to define this connection in all details." *Id.* Further, the Court in *Wilander* did not state that an employment-related connection to a vessel was a complete definition of seaman. *See id.* at 355 (stating that "we hold that a *necessary* element of the connection is that a seaman perform the work of a vessel") (emphasis added). The Court offered no indication as to whether the substantiality of the connection must still be established or, if so, whether it would be determined pursuant to the "more or less permanent connection" element of the "*Johnson* test" (as well as the three-pronged *Salgado* test) or pursuant to the language of the two-part *Robison* test.

C. The "Substantial Connection" Element after *Wilander*

As discussed above, the Supreme Court in *Wilander* did not determine under what circumstances an employment related connection with a vessel in navigation would be sufficiently substantial to qualify a plaintiff for seaman status. It is clear, however, that the Court did not express a preference for the criteria contained in the *Robison* test. Left unclear, therefore, is just what sort of connection will amount to a substantial connection. Indeed, the Supreme Court did not even recognize, much less resolve the conflict between the criteria used to determine substantial connection under the *Robison* test and those used under the *Johnson* and *Salgado* tests. Again as noted above, the Court limited its holding to the "aid to navigation" element of the three-prong test, concluding that "[t]he key to seaman status is employment-related connection to a vessel in navigation," but declined "to define this connection in all details." 498 U.S. at 355.

Nor does the Supreme Court's opinion in *Gizoni* offer much guidance in the way of what constitutes a substantial connection. In *Gizoni*, decided after *Wilander*, the Court held that a maritime worker whose occupation is one of those enumerated in the LHWCA may be nevertheless a seaman within the meaning of the Jones Act, at least where the harbor worker is also a "member of a crew of any vessel," as explained in *Wilander*. *Gizoni*, 112 S.Ct. at 491. The *Gizoni* Court quoted *Wilander* in saying that "'[t]he key to seaman status is employment-related connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the

transportation of the vessel, but a seaman must be doing the ship's work.' " *Id* at 492 (quoting *Wilander*, 498 U.S. at 355). No mention is made in either *Wilander* or *Gizoni* of the "permanent connection" language in the *Robison* case.

In this case, there is no question that Latsis at the time of his injury, was connected to a vessel in navigation, that his connection was employment-related, and that at least at the time of his injury he was "doing the ship's work," namely, action as a supervising engineer on board the vessel. In fact, it is precisely this part of the jury charge to which Chandris stipulated. Whether this connection was substantial, however, was in dispute. In charging the jury on this question, the district court appears to have adopted language from the two-part *Robison* test, instructing the jury that to find Latsis a seaman they must find that:

> First, the plaintiff was either permanently assigned to a vessel or performed a substantial part of his work on the vessel.

See Robison, 266 F.2d at 779 ("the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.") (footnote omitted). Absent disapproval by the Supreme Court, the "more or less permanent connection" formulation of the substantial connection requirement remains the law of this circuit. Therefore, it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit in *Robison*.

The formulation of substantial connection followed by this circuit in *Salgado* is quite different from that followed by the Fifth Circuit in *Robison*. The more or less

permanent connection element of the *Salgado* test is not merely a temporal concept. Under *Salgado* the substantial connection element is satisfied where there is a "more or less permanent connection with the ship." *See, e.g, Salgado*, 514 F.2d at 755 (internal quotation marks omitted). Later cases expanded the "substantial connection" element to include connections not just to one particular ship, but to an identifiable group of vessels.[3] *See Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) (pilot connected with several of defendant's tugboats held a seaman); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960) (holding that a master mechanic and an assistant who performed all maintenance, repair and overhaul work on several of defendant's ferries, often while ferries were operating, could be seamen); *see also Guidry v. Continental Oil Co.*, 640 F.2d 523, 528 n.14 (5th Cir.) ("relationship between the individual and an identifiable vessel or *group of vessels* must be substantial in point and time, not spasmodic") (emphasis added), *cert. denied*, 454 U.S. 818 (1981); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 12-13 (5th Cir.) (injured

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[3] The Robertson article refers to this rule as "the 'Fleet Amendment' to the *Robison* Test," 64 Tex. L. Rev. at 96. It goes on to suggest that the fleet cases present an "obvious doctrinal problem" because "[i]nvolvement with a single vessel, as opposed to multiple vessels, was one of the most obvious distinctions between the traditional seaman and the traditional longshoreman." *Id.* at 98. We cite these cases in support of the proposition that a person can be a "seaman" although he was not assigned to a particular vessel, but rather connected with several vessels or with a fleet. We do *not* adhere to the permanency requirement of these cases.

person must have been assigned to or performed a substantial part of his work on "a particular vessel or several specified vessels.") (citing *Braniff*), *cert. denied*, 375 U.S. 852 (1963).[4]

As pointed out by Judge Glasser in *Buccellato*, the substantial connection requirement has not been interpreted by the courts of this circuit in a narrow temporal sense. *Buccellato*, 808 F. Supp. at 972. As Judge Glasser observed, *Salgado*, quoting two earlier decisions, *Klarman* and *Harney*, only required that plaintiff have a "*more or less* permanent connection with the ship." *Salgado*, 514 F.2d at 755 (emphasis added). The court in *Klarman* had noted that the permanent connection requirement has not been read strictly but meant that the connection must be more than "temporary or transitory." *Klarman*, 503 F.2d at 33 (quoting *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973) ("Significantly, the connection may be less than permanent, but it cannot be temporary or transitory")). In *Harney*, the court noted, but did not

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[4] We underscore that both the test that we last explicated in *Salgado* and the Supreme Court's *Wilander* test speak of "connection" rather than "assignment" to a vessel. We note also that the charge in question, like the *Robison* test, referred to "assignment" rather than "connection," and in this sense might have been particularly confusing to the jury because Latsis was not "assigned" to the S.S. Galileo except temporarily from time to time. Rather, he was responsible for a fleet of vessels as to which it has long been held a person may be a seaman. *See, e.g., Guidry*, 640 F.2d at 529. It is true that the instruction here did go on to say that "vessel" could be a single ship or a number of ships owned and operated by the employer, so to that extent it took the "Fleet Amendment" into account. But this caveat did not make the charge any the less confusing.

decide, that the permanent connection requirement may include "shore-based employees who, though regularly coming aboard, spend less than a full shift there." *Harney*, 359 F.2d at 654.

An earlier Second Circuit case, not mentioned by Judge Glasser, is even more supportive of his conclusions in *Buccellato* that "the case law in this Circuit does not unequivocally require a Jones Act seaman to be substantially connected to a vessel or group of vessels as opposed to being connected to a vessel or group of vessels on a steady basis." *Buccellato*, 808 F. Supp. at 972. That is the case of *Weiss v. Cent. R.R. Co. of New Jersey*, 235 F.2d 309 (2d Cir. 1956). There, a plaintiff who in the course of his 19-day employment worked seven days on ferry boats as a deckhand or wheelsman and on six other days was employed on shore as a doorman or bridgeman, jobs connected with the docking and departure of ferries, was held a Jones Act seaman. The court noted that weighing against his claim were the factors that he was employed aboard ship for only a short period of time, that during that period he slept and ate most of his meals ashore, that he was paid an hourly wage and worked for the most part an eight-hour day, that he was employed for part of the time on jobs ashore, that he was working on an extra-man rather than on a regular basis, and that he had no seaman's papers. 235 F.2d at 311. Further, the *Weiss* Court cited *Bailey v. City of New York*, 55 F. Supp. 699 (S.D.N.Y. 1944), *affirmed*, 153 F.2d 427 (2d Cir. 1946), which held that a ferry boat engineer who worked a regular eight-hour day and slept at home was a seaman, as was a similar land-based dredge employee in *Pariser v.*

City of New York, 146 F.2d 431 (2d Cir. 1945). *See Weiss*, 235 F.2d at 3132.[5]

Unlike the *Salgado* formulation of the substantial connection requirement, the language of the *Robison* test frames the substantial connection issue primarily, if not solely, in temporal terms. Specifically, the *Robison* test provides that:

> there is an evidentiary basis for a Jones Act case to go to the jury . . . if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted). Early cases applying this test recognized that "the word 'permanent' has never been assigned a literal interpretation under the Jones Act and should not be given a 'wooden application,' but rather, is to be used as an analytical starting point instead of a self-executing formula." *Guidry*, 640 F.2d at 529 (citations omitted). Through subsequent applications of this test, however, the Fifth Circuit clearly expressed its view that substantial connection is a temporal concept to be determined by the duration of the putative seaman's connection to the vessel. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074-75 (5th Cir. 1986)

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[5] Judge Nygaard, in dissent, has made a similar observation in the Third Circuit. *Evans v. United Arab Shipping Co.*, 4 F.3d 207 at 220-21 (3d Cir. 1993) (Nygaard, dissenting) ("under Third Circuit law the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the worker's duties as they relate to the ship and the ship's mission at the time of the injury").

(en banc); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 & n.6 (5th Cir. 1980).[6]

By adopting the *Robison* test for a substantial connection, the district court limited the jury's consideration to Latsis's temporal relation to the vessel. This substantially prejudiced Latsis. Had the jury not been instructed to determine whether Latsis's contribution to the vessel was substantial only in temporal terms of "permanent assignment" or having performed a substantial part of his work aboard the vessel, the jury could well have found Latsis to be a seaman. A jury could find that he did have a substantial connection with the vessels though he may not have been on board ship a great percentage of his time because he did the specific work of supervising the

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[6] In a dissenting opinion, Judge Rubin, joined by five other judges, took issue with the majority's narrow interpretation of the substantial connection requirement as purely temporal concept. Judge Rubin wrote:

> [a plaintiff's] status as a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel. Thus, a fact finder might find that an anchor handler who is assigned to work on a specific vessel for a period of days is a crew member during that assignment. A worker may also be assigned to work as a crew member for a series of voyages of limited duration. . . . An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment.

Barrett, 781 F.2d at 1077 (Rubin, J., dissenting).

electronics systems of the ships, upgrading their computerized systems, and dealing with the computerized communication between the ships and office. Thus a jury could have found a substantial connection even though Latsis's work did not involve "permanent assignment" to a vessel or to a fleet of vessels and even if we take, as the jury might have taken, Kaparis's testimony that Latsis was on board ships only 10 percent of the time at face value. We therefore hold that the district court's instruction erroneously applied the law of this circuit regarding a core element of Latsis's claim – to the substantial prejudice of Latsis.

D. The "Drydock Instruction"

We turn now to the district court's "drydock instruction." As noted above, the district court instructed the jury:

> In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.

In so instructing, the district court seems to have injected the third prong of the old *Salgado* test – "vessel in navigation," into the substantial connection requirement. We find that this instruction further emphasized the putative seaman's temporal connection to the vessel at the risk of confusing the jury and frustrating the underlying policy of the Jones Act.

Even before the enactment of the Jones Act in 1920, Learned Hand, in extending seaman status to a bartender

on board a vessel, remarked that there is "in principle no reason why there should be an artificial limitation of rights to those engaged in the navigation of the ship, to the exclusion of others who equally further the purposes of her voyage." *The J.S. Warden*, 175 F. 314, 315 (S.D.N.Y. 1910). Judge Hand's words capture the spirit of the Jones Act, to compensate those injured in the course of work exposing them to the perils of the sea. This spirit is captured in the "vessel in navigation" element. Moreover, this element of the three-pronged test for seaman has survived *Wilander*. *See Wilander*, 498 U.S. 355 ("the key to seaman status is employment-related connection to a vessel *in navigation*") (emphasis added).

Courts have interpreted "perils of the sea" broadly. Not only may seamen recover under the Jones Act for injuries traditionally associated with the sea – a swinging boom, a sinking ship – but seamen may recover for injuries more commonly experienced by land-based employees. *See, e.g., Pace*, 378 F.2d at 12 (recovery allowed for seaman injured in automobile accident while en route to vessel). In this case, Latsis's employment did expose him to the perils of the sea – in fact, his injury was result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling. Not every worker connected with a vessel is exposed to the perils of the sea, however. On the contrary, only workers connected to a "vessel *in navigation*" are so exposed – even if the exposure results in nothing more than an injury sustained

while driving to the vessel. *See id.* The "vessel in navigation" element, therefore, does not limit the substantiality of an employee's connection with a vessel. Rather, the "vessel in navigation" element was designed to limit seaman status to those whose employment regularly exposes them to the hazards of the sea.

We note that the case upon which the district court evidently relied, in instructing the jury that in considering the substantial connection element it should discount the time during which the Meridian, formerly the S.S. Galileo, was in drydock in Germany, involved an accident while the vessel was in drydock and, hence, not in navigation. *See McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569-70 (9th Cir. 1992). *McKinley* may properly be read as holding that a ship undergoing complete conversion, as the vessel was in that case, takes a vessel out of navigation. *See West v. United States*, 361 U.S. 118, 121 (1959) (per curiam) (non-Jones Act case finding no warranty of seaworthiness while vessel was undergoing major structural repairs). But this does not necessarily mean that the time during which a vessel is undergoing conversion cannot count towards the substantiality of an employment-related connection with the vessel. During the course of Latsis's employment with Chandris – omitting the consulting time – from approximately March of 1989 until his termination in November, 1990, he spent some six months working seven days a week on board the vessel, supervising the project as the only naval architect, including the drydocking, bottom removal, cleaning and removal of the propellers, overhauling the main engines, rebuilding the boilers, and reconstructing the accommodation spaces and public rooms. Why this time

should not count in terms of determining the substantiality of his connection to the Chandris vessels, we do not know. While we express no opinion as to whether Latsis would have been covered had he been injured while the vessel was in drydock in Bremerhaven, we do suggest that in terms of meeting any requirement of connection to the vessel or vessels, this time can count.

IV. CONCLUSION

Although *Salgado*'s formulation of the substantial connection element remains the law of this circuit after *Wilander* and *Gizoni*, we think it useful to clarify this formulation in light of *Wilander* and *Gizoni*. Such clarification is made all the more pressing by the fact that although *Wilander* and *Gizoni* left *Salgado*'s formulation of the substantial connection requirement intact, the Supreme Court in those cases did jettison another aspect – the aid to navigation element – of that test.

Clarification is also important considering that the Fifth Circuit has continued to adhere to its narrow interpretation of the substantial connection requirement. In *Bach v. Trident Steamship Company, Inc.*, 920 F. 2d 322 (5th Cir.), *vacated*, ___ U.S. ___, 111 S. Ct. 2253 (1991), two members of the panel held that a compulsory pilot was not a seaman because he was not connected to a vessel or an identifiable fleet of vessels, and refused to find an exception in favor of a maritime worker who spends virtually all of his time performing traditional seaman's duties – work closely related to the movement of vessels – but does his work on short voyages aboard a large number of vessels. Judge Brown dissented, stating that

Congress did not mean to exclude from the protection of the Jones Act compulsory pilots while aboard in directing the navigation of a vessel. *See Bach*, 920 F.2d at 327-33 (Brown, J., dissenting). The Supreme Court vacated the opinion and remanded for reconsideration in light of *Wilander*. ___ U.S. at ___, 111 S. Ct. at 2253. The panel majority reinstated its decision, holding that it had previously "concluded that [the pilot] was not a seaman because he was not permanently assigned to any particular vessel or fleet of vessels." *Bach v. Trident S.S. Co., Inc.*, 947 F.2d 1290, 1291 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992). Judge Brown again dissented, stating that "although *Wilander* turns out not to be the decisive guide," what it does say affords "undeniable support" to the views he had set forth in his initial dissent. *Bach*, 947 F.2d at 1291 (Brown, J., dissenting). In addition, he quoted the *Wilander* case extensively and we may read him as saying that at least in the case of a pilot and his unique status as a seagoing functionary, the requirement of "permanency" set forth in the various cases as a part of the test is simply no longer of force and effect, at least in the temporal sense.

The substantial connection requirement has two purposes. First, by requiring a "more or less permanent connection *with a vessel*" or with a fleet of vessels, it excludes from Jones Act seaman status workers whose work may bring them into contact with many vessels but who are not connected with any particular vessel or identifiable group of vessels. Through this exclusion, the substantial connection element leaves workers with no connection to a particular vessel or group of vessels to coverage under the Longshore and Harbor Workers'

Compensation Act (LHWCA) – from which "seaman" or, more precisely, "a master or member of a crew of any vessel" are themselves excluded. 33 U.S.C. § 901 *et seq.* (1988). Second, by requiring a "*more or less permanent connection* with a vessel" or fleet of vessels, it excludes from coverage those whose contribution, although limited to a single vessel or fleet of vessels, was nevertheless only a temporary or transitory connection with the vessel. *See Klarman*, 503 F.2d at 33 (putative seaman's connection must be more than "temporary or transitory").

It seems that much of the confusion surrounding "more or less permanent connection with a vessel" language is attributable to the fact that the language is designed to perform two functions – i.e., exclude two different types of workers from seaman status. *See Buccellato*, 808 F. Supp. at 972. Indeed, the Fifth Circuit's adherence to a narrowly interpreted permanent assignment requirement has been criticized by the Supreme Court of Louisiana on essentially this ground. *Folse v. W. Atlas Int'l, Inc./Downhole Seismic Servs.*, 593 So. 2d 341 (La. 1992).

In *Folse*, the plaintiff had been held by the Louisiana Court of Appeal not to be a seaman because he was not permanently attached to a specific vessel or an identifiable fleet of vessels. *See Folse v. W. Atlas Int'l, Inc.*, 580 So. 2d 482 (La.App. 4th Cir. 1991), *rev'd*, 593 So.2d 341 (La. 1992). In reversing, the Supreme Court of Louisiana discussed the permanent attachment language of *Robison* and *Bach*, saying that "[t]his requirement was designed to distinguish between transitory, land-based employees and those working aboard a vessel for a voyage." 593 So. 2d at 343 (citing the Robertson article). The majority

pointed out that *Wilander* did not mention more or less permanent attachment to a vessel or fleet of vessels,[7] and that *Gizoni* cast further doubt on this requirement because Gizoni "only 'rode' the platforms during working hours." *Id.* The Louisiana court went on to say that Folse was not a land-based worker providing shore services to docked vessels but rather a seaman who went to sea on specific short voyages and who was not merely a transitory employee. The court went on to say that although Folse's assignment was less transient than Bach's, it was not permanent. Rather, "[i]t involved substantial work on given missions." *Id.*[8]

We find that much confusion could be alleviated by breaking down the "more or less permanent connection with a vessel" language into two separate elements. Thus, the substantial connection requirement is met where the putative seaman establishes an employment-related contribution that is (1) limited to a single vessel or group of vessels and (2) substantial in terms of its (a) duration and (b) nature. In considering whether the putative seaman's contribution is substantial in terms of its duration, the jury may consider the number and frequency of similar contributions to that vessel or to an identifiable fleet of

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[7] Justice Dennis, concurring in the *Folse* majority, suggested "that the *Robison* requirement of permanent attachment is subsumed in the greater definition of *Wilander* that to qualify as a seaman, an employee must contribute to the function of a vessel." 593 So. 2d at 344 (Dennis, J., concurring).

[8] The same is true of Latsis, except that on shore Latsis was directly involved with the electronic communications and equipment of the Chandris fleet, surely of considerable importance to their navigation.

vessels. Further, in considering whether the contribution is substantial in terms of its nature, the jury may consider the amount of time and effort spent ashore preparing for the contribution, as well as the amount and time and effort spent in drydock consummating the contribution.

We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

In this case, the first of the foregoing criteria was stipulated to. As to the second, there is no dispute in the evidence and the verdict should accordingly be directed. The third – the substantiality element – is not only in dispute, but the evidence is not clear as to what extent Latsis's land-based and drydock work bore on (3)(b). Therefore, we instruct the trial court to frame its instructions to the jury in light of *Wilander* and *Gizoni* and other cases and opinions above referred to, not in terms of assignment to a vessel or as requiring permanency but, rather, in terms of the employment-related connection to the Chandris fleet. The jury also should be instructed that in determining what is "substantial" in terms of the duration of Latsis's contribution to the vessel or fleet of vessels, the number and frequency of similar contributions may be taken into account. Further, the jury should also

be instructed that in determining what is "substantial" in terms of the nature of Latsis's contribution, Latsis's on-shore preparation should be taken into account, as well as the time Latsis spent in drydock in Bremerhaven, Germany consummating his contribution. Finally, the jury should also be instructed to determine whether the course of Latsis's employment regularly exposed him to the hazards of the sea. As to the proof of these matters, the putative seaman of course has the burden.

Judgment vacated, case remanded for retrial with instructions to the jury in accordance with this opinion.

Latsis v.
Chandris,
Inc.
No. 93-7704

MAR 24 1994

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT
FILED: MAR 24 1994
GEORGE LANGE III, CLERK

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent.

Though I agree that the four criteria articulated by the majority *ante* at 31-32 should govern the determination of whether an employee is a "seaman" within the meaning of the Jones Act, even under that formulation I am unpersuaded that the non-dry-dock part of the district court's instructions, to which Latsis made no objection, constituted "plain" error. Further, I am unpersuaded

that the district judge erred in instructing the jury that, in determining whether plaintiff Latsis was a seaman, it should disregard the period during which the *Galileo* was in dry dock. The Jones Act concept of " 'seaman' " contains a "land-based/sea-based distinction." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354 (1991). The $65 million-dollar dry-dock conversion and reconstruction of the *Galileo* was unquestionably a land-based activity. In my view, this part of the instructions – the only part to which Latsis objected – was correct.

Accordingly, since in my view the only portion of the instructions to which Latsis objected was not erroneous, and since the remainder of the instructions did not constitute plain error, I would affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIOS LATSIS, Plaintiff, -against- CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD., Defendants.	91 **CIVIL** 6900 (LAP) **JUDGMENT** **U.S. DISTRICT COURT** **S.D. OF N.Y.** **(Filed Jun. 17, 1993)**

A Jury Trial before the Honorable LORETTA A. PRESKA, United States District Judge, having begun on June 8, 1993, during the trial the Court having reserved decision of defendants' motion to dismiss, thereafter the trial having continued, and at the conclusion of the trial the jury having answered the attached "Verdict Form," and the jury in so doing having returned a verdict in favor of defendants, and the Court directing the complaint be dismissed, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in its entirety.

DATED: NEW YORK, NEW YORK
June 14, 1993

JAMES M. PARKISON
Clerk
By: /s/ _____
Ronald A. Church
Deputy Clerk

APPROVED:
/s/ _____
Loretta A. Preska
U.S.D.J.

VERDICT FORM

1. Was Antonios Latsis a "seaman"?
   Yes _____ No X

If the answer to question number 1 is yes, continue on.

2. Were the defendants negligent in their treatment of plaintiff?
   Yes _____ No _____

If the answer to question number 2 is yes, continue on.

3. Was the defendants' negligence the proximate cause of plaintiff's injury?
   Yes _____ No _____

If the answer to question number 3 is yes, continue on.

4. If you have responded yes to all above questions then you must determine what damages, if any, plaintiff is entitled to.

   a. Compensation for lost earnings.
      Amount _____
   b. Compensation for past pain and suffering.
      Amount _____
   c. Compensation for future pain and suffering.
      Amount _____

5. Was plaintiff contributorily negligent in causing the injury?
   Yes _____ No _____

If the answer to question number 5 is yes, continue on.

6. Was plaintiff's negligence the proximate cause of his injury?
   Yes _____ No _____

If the answer to questions number 5 and 6 is yes, then answer question number 7. If the answer to either question number 5 or question number 6 is no, then return the verdict form.

7. What percentage of the entire injury was a result of plaintiff's contributory negligence?
   Percentage _____

8. Reduce the total amount of damages (4a+4b+4c) by the percentage of contributory negligence of plaintiff found in answer to question 7.

Verdict for plaintiff in the sum of $_____.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED: May 24 1994
GEORGE LANGE, III, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ___ day of May on thousand nine hundred and ninety four

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Antonios Latsis,

Plaintiff-Appellant,

-v-

Chandris, Inc., Chandris, S.A., Trans Oceanic Shipping Co., Ltd.,

Defendants-Appellees.

DOCKET NUMBER 93-7704

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ _____
Carolyn Clark Campbell
Chief Deputy Clerk

93-7704

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,

Plaintiff-Appellant,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPT FROM JOINT APPENDIX A303-A305 – JURY CHARGE

Now let's talk a bit about the specific claims that are presented here.

The plaintiff, Antonios Latsis, brings this action against the defendants under the Jones Act. The Jones Act provides in substance that every employer whose employees are members of the crew of a vessel in navigation shall be liable in damages for injuries sustained by the employee as a result, in whole or in part, of the negligence of any of the employer's officers, agents or employees or from any defect or deficiency, due to its negligence, in the vessel, its crew or its equipment.

Before you find the the [sic] defendants liable to plaintiff under the Jones Act, the plaintiff must prove by a preponderance of the evidence four elements:

First, that the plaintiff was a member of the crew of a vessel, acting in the course of his employment; that is, that he was a seaman; two, that the defendants were, or one of them, were plaintiff's employer; three, that the defendants or an officer, employee or agent of one of them was negligent; and four, that such negligence played a part, no matter how slight, in bringing about the injury to the plaintiff.

Now, as to element number one, that is, that plaintiff was a seaman, regarding this first element, you may find that plaintiff was a seaman if you find by a preponderance of the evidence two things:

First, that plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers.

The second thing required in proving seaman status is that plaintiff prove by a preponderance of the evidence that the capacity in which he was employed or the duties he performed contributed to the function of the vessel or the accomplishment of the vessels' mission or to the operation or maintenance of the vessels during their

movements or while at anchor for the vessels' future trips.

The parties have agreed that the work of the plaintiff aboard these ships was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions.

So the parties have agreed that the second element involved in proving seaman status has been met.

In considering whether plaintiff has otherwise proved seaman status you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer.

If you find by a preponderance of the evidence that plaintiff was indeed a seaman, then you will go on to consider the other elements of the Jones Act claim.

93-7704

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,

Plaintiff-Appellant,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and
TRANS OCEANIC SHIPPING CO., LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXCERPT FROM JOINT APPENDIX A316 – VERDICT

THE CLERK: Has the jury reached a verdict?

FOREPERSON: Yes, we have.

THE CLERK: Mr. Searcy, please rise. Question 1. Was Antonios Latsis a seaman? What is your answers? [sic]

FOREPERSON: No.

THE CLERK: Be seated. Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. Question 1. Was Antonios Latsis a seaman? Your answer: No.

THE COURT: Does anyone wish the jury to be polled?

MR. ROSENBERG: Yes, your Honor, I request the jury be polled.

THE CLERK: Ladies and gentlemen of the jury, you have heard your verdict as it stands recorded:

> Question 1. Was Antonios Latsis a seaman? Your answer: No. Is that your verdict?
>
> (Jury polled)

THE CLERK: Jury polled; verdict unanimous.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANSOCEANIC SHIPPING CO., LTD.,

Defendants.
----------X

91 Civ. 6900 (LMM)

AMENDED ANSWER

TO: SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX
Attorneys for Plaintiff
ANTONIOS LATSIS
225 Broadway, Suite 1115
New York, NY 10007
Attn: Lewis Rosenberg, Esq.

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD. (incorrectly sued herein as "TRANSOCEANIC SHIPPING CO., LTD.") by their attorneys, Poles, Tublin, Patestides & Stratakis, as and for their answer to the amended complaint herein, allege upon information and belief as follows:

1.) Deny the allegations contained in paragraph FIRST of the Amended Complaint herein.

2.) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND of the Amended Complaint.

3.) Admit the allegations contained in paragraph THIRD of the Amended Complaint.

4.) Admit the allegations contained in paragraph FOURTH of the Amended Complaint.

5.) Admit the allegations contained in paragraph FIFTH of the Amended Complaint.

6.) Admit the allegations contained in paragraph SIXTH of the Amended Complaint.

7.) Admit that, at all material times, CHANDRIS, S.A. transacted business in the State of New York through its agent CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph SEVENTH of the Amended Complaint.

8.) Admit that, at all material times, FOURTH TRANSOCEANIC SHIPPING CO., LTD., transacted business in the State of New York through CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph EIGHTH of the Amended Complaint.

9.) Admit that CHANDRIS, INC. previously maintained an office and place of business in New York at 900 Third Avenue, New York, New York and that said office was recently moved to 950 Third Avenue, New York, New York, and, except as so admitted, deny the allegations contained in paragraph NINTH of the Amended Complaint.

10.) Deny the allegations contained in paragraph TENTH of the Amended Complaint.

11.) Deny the allegations contained in paragraph ELEVENTH of the Amended Complaint.

12.) Admit that defendant FOURTH TRANSOCEANIC SHIPPING CO., LTD., was, at all material times, the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

13.) Admit that in January of 1989, the plaintiff ANTONIO LATSIS, entered the employment of the defendant CHANDRIS, INC., acting as a principal, to provide maritime engineering consulting services from their offices, and that in the course of such employment he did attend aboard the vessel S/S GALILEO in or about May, 1989 and, except as so admitted, deny the allegations contained in paragraph THIRTEENTH of the Amended Complaint.

14.) Admit that in May, 1989 the plaintiff boarded the vessel S/S GALILEO in his capacity as an employee of CHANDRIS, INC. for a voyage from Baltimore, Maryland to the isle of Bermuda and, except as so admitted, deny the allegations contained in paragraph FOURTEENTH of the Amended Complaint.

15.) Admit that in May, 1989, the defendant CHANDRIS, S.A., in its capacity as the vessel's manager, was employing a physician to provide medical services to those aboard the S/S GALILEO and, except as so admitted, deny the allegations contained in paragraph FIFTEENTH of the Amended Complaint.

16.) Admit the allegations contained in paragraph SIXTEENTH of the Amended Complaint.

17.) Admit the allegations contained in paragraph SEVENTEENTH of the Amended Complaint.

18.) Deny the allegations contained in paragraph EIGHTEENTH of the Amended Complaint.

19.) Deny the allegations contained in paragraph NINETEENTH of the Amended Complaint.

20.) Deny the allegations contained in paragraph TWENTIETH of the Amended Complaint.

21.) Deny the allegations contained in paragraph TWENTY-FIRST of the Amended Complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

22.) Plaintiff's injuries, if any, were solely caused and/or aggravated by his own negligence, and, therefore, the defendants are not liable.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

23.) Plaintiff failed to mitigate his damages and, therefore, defendants are not liable.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

24.) Defendants exercised reasonable care in hiring the physician serving aboard the S/S GALILEO who treated the plaintiff and, therefore, defendants are not liable.

WHEREFORE, defendants pray that plaintiff's Amended Complaint be dismissed in all respects and that this Court grant them the costs and disbursements of the

action as well as such other and further relief as it may deem necessary and proper.

Dated: New York, New York
April 7, 1992

POLES, TUBLIN, PATESTIDES
& STRATAKIS
Attorneys for Defendants

By: /s/ _____
William J. Brady, III
(5965)
A Member of the Firm
46 Trinity Place
New York, New York 10006
(212) 943-0110

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants.

----------X

AMENDED COMPLAINT
91 CIV. 6900 (LMM)

PLAINTIFF REQUESTS A TRIAL BY JURY

ANTONIOS LATSIS, by his attorneys, SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX, complaining of the defendant CHANDRIS, INC. upon information and belief, alleges as follows:

FIRST: This action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S.C. Section 688, as hereinafter more fully appears.

SECOND: At all times hereinafter mentioned, plaintiff, ANTONIOS LATSIS, resided at 9 Robert Crisfield Place, City of Rye, State of New York.

THIRD: At all times hereinafter mentioned, defendant, CHANDRIS, INC. was and remains a domestic corporation duly organized and existing under the laws of the State of New York.

FOURTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A. was and remains a foreign corporation.

FIFTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., was and remains a foreign corporation.

SIXTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., transacted business in the State of New York.

SEVENTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A., transacted business in the State of New York either directly for TRANS OCEANIC SHIPPING CO., LTD. or through its agent, CHANDRIS, INC.

EIGHTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., transacted business in the State of New York either directly for CHANDRIS, S.A. or through its agent, CHANDRIS, INC.

NINTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., maintained an office of business at 900 Third Avenue, City and State of New York.

TENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, INC., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

ELEVENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, S.A., was the owner of the cruise ship S/S GALILEO and used it in the transportation of

passengers for hire by water in interstate and foreign commerce.

TWELFTH: At all times hereinafter mentioned, the defendant, TRANS OCEANIC SHIPPING CO., LTD., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

THIRTEENTH: During the first part of January, 1989, plaintiff, ANTONIOS LATSIS, entered the employment of the defendant, CHANDRIS, INC., acting as principal or manager or agent for defendants, CHANDRIS, S.A. and/or TRANS OCEANIC SHIPPING CO., LTD., as a "seaman", engaged to provide maritime engineering consulting services while on board the aforementioned vessel.

FOURTEENTH: On or about May 12, 1989, plaintiff, ANTONIOS LATSIS, boarded the defendants' vessel, S/S GALILEO, in his capacity as maritime engineering consultant for a voyage from Baltimore, Maryland to the isle of Bermuda.

FIFTEENTH: At all times hereinafter mentioned, the defendants provided to its seamen and others a physician(s) to perform necessary and proper functions pertaining to diagnosing and treating diseases and pathological conditions of the human body.

SIXTEENTH: On or about May 14, 1989, said vessel was approximately two (2) days out of port of Baltimore, Maryland and was being navigated by the master and crew.

SEVENTEENTH: On or about May 14, 1989, plaintiff sought the professional care of the defendants' physician(s) for the medical complaints from which he was suffering.

EIGHTEENTH: The aforesaid medical care, diagnosis, treatment and services were rendered carelessly, unskillfully and negligently and not in accord with accepted standards for medical care in the community.

NINETEENTH: That such negligence and malpractice was committed by the defendants' physician(s) in the scope of his/her employment of the defendants.

TWENTIETH: As a result of defendants' negligence, plaintiff was directed to remain on board of said vessel for a period of two (2) days without the required prompt and proper medical and surgical attendance. During said time, plaintiff was suffering great physical and mental pain and was in need of immediate medical and surgical attendance, but defendant negligently failed to furnish plaintiff with such medical aid and attention or to transport him to an available health facility nearby.

TWENTY-FIRST: By reason of the aforementioned failure and negligence on the part of the defendants, plaintiff's injuries were greatly enhanced, aggravated and extended and he has thereby sustained permanent and incurable injury.

WHEREFORE, plaintiff, ANTONIOS LATSIS, demands judgment against defendants, in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs and disbursements of this action.

Plaintiff further requests a trial by jury on all issues of fact stated herein.

Dated: New York, New York
March 12, 1992

SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX
By: /s/ _____
LEWIS ROSENBERG
(LR-5791)
Attorney for Plaintiff
ANTONIOS LATSIS
225 Broadway – Suite 1115
New York, New York 10007
(212) 267-9020

46 U.S.C. § 688 (1994)

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred-

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended Dec. 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

33 U.S.C. § 902 (1994)

§ 902. Definitions

When used in this chapter –

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) the term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).